Supreme Court, U.S.
FILED

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JAMES B. HEALY

Petitioner,

vs.

FAIRLEIGH DICKINSON UNIVERSITY,
FRANCIS J. MERTZ, NANCY S. BARRETT,
MORDECHAI ROZANSKI,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

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PETITION FOR A WRIT OF CERTIORARI

James B. Healy, Petitioner
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ltr ppr

QUESTIONS PRESENTED

1. Wherein through a state civil trial by jury, the jury found the plaintiff to be a full-time faculty member at a private university for a period exceeding that needed for academic tenure to apply; though the trial judge and appellate division would not make a finding that plaintiff had tenure, indicating superiority of one contractual provision over another and calling for use of one method of tenure acquisition and process at the university; and wherein the university had never accorded plaintiff this applicable method of tenure process including peer review, because it did not deem him at the time of his separation from employment to be a faculty member, which the jury has subsequently found to the favor of the plaintiff; did the university through its omissions and contractual breaches and the state courts through their refusal to decide substantive state and federal claims deny to plaintiff rights following from the jury verdict that established plaintiff's faculty status, including his constitutional rights to due process in the tenure matter and employment separation from the faculty, with respect to his freedom of speech (academic freedom) and property interests in his livelihood and the contractual procedures related to both?

2. Where a private university has expressly agreed in contract with its faculty to adhere to a system and procedure on academic freedom and tenure which is of national, general and interrelated acceptance by both private and public colleges and universities, (1940 Statement of Principles on Academic Freedom and Tenure), and which specifies the period after which academic tenure attaches de facto in order to protect freedom of speech and expression so necessary to the educational endeavor, is a faculty member,

QUESTIONS PRESENTED (Continued)

as so found by jury decision, entitled to the substantive provisions (including tenure acquisition and its standing among subsequent employers in academe) and the due process of this nationwide system and procedure under Fourteenth and First Amendment protections to his liberty and property interests and rights, which the state courts are called to uphold?

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Brown, Ralph S. and Kurland, Jordan E. "Academic Tenure and Academic Freedom" in "Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles," Law and Contemporary Problems, Vol. 53, No. 3, Durham, N.C., Summer, 1990 3,14

Byse, Clark and Joughlin, Louis. Tenure in American Higher Education: Plans, Practices, and the Law, Ithaca, NY: Cornell University Press, 1959. 3

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OPINIONS BELOW

The decisions of the New Jersey Supreme Court on motions for reconsideration of certification and remand for a due process order (App. 1, infra.) are not yet reported. The instant matter is filed with the honorable Court to assure timely compliance with Rule 13 and Rule 14.5. The order of the Supreme Court of the State of New Jersey denying certification is duplicated at App. 5, infra. The opinion of the New Jersey Superior Court, Appellate Division, is duplicated at App. 6, infra. The decision of the Trial Judge, New Jersey Superior Court, is duplicated at App. 16, infra.

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on June 5, 1996 (App. 5, infra.). Decisions on motions to the New Jersey Supreme Court for reconsideration of certification and remand for a due process order are not yet reported. The instant matter is filed at this time with the honorable Court to assure timely compliance with Rule 13, Rule 14.5 and the July 31, 1996 letter of the Clerk of the honorable Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> ...Nor shall any State deprive any person of life, liberty, or property, without due process of law...

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law...
> abridging the freedom of speech...

STATEMENT OF THE CASE

Petitioner James B. Healy began part time employment as a faculty member with Fairleigh Dickinson University (FDU), Respondent, in the fall of 1979, and was appointed to a full time faculty rank as Assistant Professor in the spring of 1980. Healy was appointed Associate Professor in the fall of 1980 and continued until June, 1990 as a faculty member, in addition to serving in various academic administrative positions as department chairperson, program director, and associate dean. At the time of Healy's employment in the fall of 1979, a Collective Bargaining Agreement existed between the faculty (represented by American Association of University Professors, [AAUP]) and the University. Provisions of this contract, the AAUP-FDU Agreement, dated April 7, 1978, under which Healy was employed, relate to long-term commitments associated with academic tenure. The AAUP-FDU Agreement was renewed until 1986-1988, when the AAUP was decertified. The 1988 Faculty Handbook subsequently replaced the AAUP-FDU Agreement. Both contained similar provisions regarding tenure, and both referred to and subscribed to the 1940 Statement of Principles on Academic Freedom & Tenure (1940 Statement), (App. 25, infra.), which sets forth the historic reason for tenure in academe as a protection for academic freedom, and which provides for a system and procedure relating thereto, having national and general

acceptance within academe and affecting faculty moving between institutions of higher learning, both public and private, throughout the country. See Brown, Ralph S. and Kurland, Jordan E. "Academic Tenure and Academic Freedom" in Law and Contemporary Problems, Vol. 53, No. 3, Durham, N.C., Summer, 1990 and Byse, Clark and Joughlin, Louis. Tenure in American Higher Education: Plans, Practices, and the Law, NY: Cornell University Press, 1959.

Healy was employed by FDU continuously from 1979 to 1990 as a faculty member teaching graduate and undergraduate students in the College of Business Administration and School of Hotel, Restaurant and Tourism Management. In addition to his faculty teaching responsibilities, Healy performed assigned academic administrative functions as associate dean of the College of Business and director/chairperson of the School of Hotel, Restaurant and Tourism Management, and served on numerous committees. Healy's tenure track began to run as of the spring semester, 1980, and his position is that he achieved tenure no later than September of 1987 by virtue of the AAUP-FDU Agreement, dated April 7, 1978, effective at the time when and under which Healy was hired as faculty; Sections 8.32(e) and (specifically) 8.32(i) state that tenure occurs automatically after fourteen academic semesters. A subsequent document to the foregoing AAUP-FDU Agreement was the 1988 FDU Handbook, which, under Sections VIII.3, 3.3, and 4.2, reiterates the basis by which tenure occurs. These provisions comport with the national standard set forth in the 1940 Statement of Principles on Academic Freedom and Tenure, which states that after the expiration of a probationary period (not more than seven years), teachers should have permanent or continuous tenure in order to protect academic freedom.

While Healy was notified by letter from Finance Vice President (Non-academic position) Judy DeMattea on July 9, 1986, that he was classified as a Senior Administrator as of *July 1, 1986 for payroll/budgetary purposes, he did not* relinquish his faculty position or status to which he was appointed on February 5, 1980 as Assistant Professor, and re-designated as Associate Professor on June 19, 1980 based on his professional achievement per Section 8.27(4)(c) of the AAUP-FDU Agreement. Healy did not make any comment at the time regarding a notation on one document, "non-tenured position," since he had not yet reached tenure in the position at the time (fourteen semesters had not yet run). This latter material fact was missed by the New Jersey Superior Court, Appellate Division, in its opinion of the case. FDU assigned Healy to teaching duties throughout this period, continuing him in his faculty status, as factually determined by the trial jury.

In the spring of 1989, a new dean, Nancy Barrett, was appointed to the College of Business Administration. Shortly thereafter disputes among faculty began emerging regarding retention, conduct, status and leadership of the School of Hotel, Restaurant and Tourism Management. Healy recused himself from his role as chair in the review process in view of these disputes.

On March 2, 1990, Healy was scheduled to be evaluated by Dean Barrett for his performance with respect to the administrative directorship of the School of Hotel, Restaurant and Tourism Management. When Healy entered the Dean's office at the Madison campus, she handed him a 2/26/90 memorandum from Dr. Richard Wisch, as School of Hotel, Restaurant and Tourism Management Department Personnel Review Committee chair, in which he requested on behalf of several unnamed faculty, a re-evaluation of department

administrative leadership without showing cause.

Healy had confronted Dr. Richard Wisch, a faculty member of the School of Hotel, Restaurant and Tourism Management earlier, on May 31, 1988, with a summary of the numerous complaints received from faculty, students, and alumni, because of Wisch's failure to keep office hours, inordinate number of unauthorized class absences, late arrivals to class, early class dismissals, and inappropriate (non-school) use of complimentary hotel rooms with a male companion obtained through unwanted influence over students/alumni working at hotel facilities. Following this meeting, the relationship between Dr. Wisch and Healy was strained and surely precipitated Dr. Wisch to request that Healy's competence as a chairperson be evaluated, which ultimately led to the University's improper separation of Healy without cause from his faculty position.

Dean Barrett executed a performance evaluation (relative to the administrative position) of Healy out of his sight and recommended to Dr. Mordechai Rozanski, Vice President for Academic Affairs, that he not be renewed as an administrator. Dr. Rozanski advised Dean Barrett by memorandum, dated April 25, 1990, that he accepted the Dean's recommendation and so advised Healy by copy of the same memorandum. Vice President Rozanski did not provide Healy with a grievance hearing opportunity, which he was required to do under paragraph 1, Section X, of the 1988 Faculty Handbook, and Article 15, of the AAUP-FDU Agreement. University officials at this time would not recognize Healy as a faculty member, notwithstanding his continuous and ongoing service in teaching.

On May 16, 1990, Healy sent a letter of appeal, with background documents, to Francis Mertz, Interim President

of FDU. At a meeting held in the President's office on August 21, 1990, President Mertz stated his position that he would not review the matter of faculty tenure and promotion since he deemed the matters were not within his purview, contrary to contract provisions.

Healy was thereupon separated from his employment with the University. He had not been given a tenure review process, including peer review, as set forth in Article 10 of the AAUP-FDU Agreement and Section IX of the 1988 Faculty Handbook. Also, he was not accorded the grievance process under Article 15 of the AAUP-FDU Agreement and Section X of the 1988 Faculty Handbook regarding his separation from the faculty. At this time, the various University officials incorrectly treated him as if he were not a faculty member.

As a consequence of this incorrect view taken by the University and its officials at the time, Healy was not accorded the contractual procedures and due process to which he was entitled from the University, including the following:

1. VPAA Rozanski's failure to comply with Article 15.5 of the AAUP-FDU Agreement, and Section X of the 1988 Faculty Handbook, which provided for a **Grievance Process** before a faculty committee, which the VPAA is required to initiate for faculty members, but failed to do so for Healy.

2. Dean Barrett or her predecessors did not submit Healy's name to the College Faculty Status Committee for faculty status

review action as required by Article 11.22 of the AAUP-FDU Agreement, and Section IX of the 1988 Faculty Handbook. Healy was thereby denied the tenure procedure method, which required peer review.

3. Dean Barrett failed to provide written notice that Healy's faculty appointment was not to be renewed, thus denying him the benefit of a terminal contract for one year as prescribed under paragraph 8.33(d), Article 8, of the AAUP-FDU Agreement. Expert testimony at trial explained this nationwide process.

Furthermore, the University failed to meet its obligations to Healy under the 1940 Statement of Principles on Academic Freedom and Tenure, which it expressly referenced and subscribed to in its contractual documents (AAUP-FDU Agreement and 1988 Faculty Handbook).

The instant matter was thereafter initiated on December 26, 1990, when Healy brought suit, in New Jersey Superior Court, Law Division, Bergen County against defendants, FDU and three of its administrators. On March 25, 1994, the jury returned a verdict, which read:

"Did plaintiff, James B. Healy, commence service of his fifteenth consecutive semester of full time contractual service in a faculty position? And we said yes."

As to the matter of the administrative employment (Chairman/Director) contract, the jury found against Healy.

The Trial Court, on June 21, 1994, after post trial briefing and oral argument, issued an opinion that the jury's fact finding had no legal affect as to Healy's claim for tenure. An order was entered on August 1, 1994, dismissing the complaint. The Trial Judge did not address Healy's claims relative to a lack of due process under the University's procedures nor did she pursue the consequential requirements following the jury's verdict on Healy's faculty status with regard to due process set forth in the AAUP-FDU Agreement and the 1988 Faculty Handbook. Though extensive expert testimony was provided at trial by Dr. Donald Koster relative to tenure in academe, including the nationally accepted practice therein as reflected and provided in the 1940 Statement, the trial judge's and the subsequent Appellate Division's opinions were silent on this.

On appeal, the New Jersey Superior Court, Appellate Division, on February 20, 1996, affirmed the judgment of the Trial Court. Though the underlying reason for, and history of, academic tenure in the protection of academic freedom, including the generally accepted practices and customs of academe nationwide related thereto, were, extensively briefed, the Appellate Division did not address the relationship between academic tenure and academic freedom of expression and the procedural protections related thereto. Though the 1940 Statement was raised in several contexts within plaintiff's brief, including the sixth point of appeal related specifically to federal and state constitutional due process issues, the Appellate Division did not discuss the 1940 Statement in its opinion. The constitutional analysis was limited to a statement that the University was private.

Healy's petition for certification to the New Jersey Supreme Court was filed on March 11, 1996. Federal constitutional questions were again raised, particularly in

Point III of petitioner's brief to the N.J. Supreme Court. That court denied certification on June 5, 1996. Healy entered motions for Reconsideration of Certification and for Remand for a Due Process Order, which were filed in the New Jersey Supreme Court on June 18, 1996. No decisions on these motions have been received.

REASONS FOR GRANTING THE PETITION

The complaint to the Trial Court in this case enumerated Healy's rights and interests to tenure protections in his livelihood as a faculty member, and the procedures related thereto, which the University had violated. The court did not fully address in its decision the rights attached to his faculty status, including procedural rights, following upon the jury's determination of his faculty status. Though agreeing with the jury's finding of full time faculty status, yet disagreeing that tenure had attached de facto, the trial judge dismissed the case and plaintiff's livelihood and career without deciding how the University's failure to follow procedures, it had agreed to by contract for faculty members relative to separation thereof, impacted the case. The University never accorded these procedures to Healy at the time of his separation because of its erroneous view that Healy was not a faculty member. The State courts should not have effected a deprivation of liberty and property rights and interests, without assuring that contractually agreed procedural due process is accorded. The petitioner's Motion for Reconsideration to the Supreme Court of New Jersey, in App. 1, remains pending on this point.

The Appellate Division of the New Jersey Superior Court was petitioned vigorously in Healy's appeal on the matters of academic freedom, academic tenure, procedural due process,

and liberty and property interests and rights. The Court chose not to address in detail the federal and state constitutional questions raised, failing to address most of these points in its final opinion. The constitutional issues were again raised to the Supreme Court of the State of New Jersey, which chose not to certify the case for review of the merits.

There is little indication from the rulings in the New Jersey State courts to shed light on their reasonings for not considering the Federal and State constitutional issues raised in this case. By denying certification, the Supreme Court of New Jersey did not render an opinion on the merits of this case and did not provide plaintiff with the highest court's determination of New Jersey law on tenure de facto at private institutions of higher learning, leaving the case of American Assoc. of Univ. Profs. v. Bloomfield College, 129 N.J.Super. 275 (1974), Aff'd. 136 N.J.Super. 442 (App. Div., 1975) as the most significant in this area. The importance of Bloomfield College state law as it impacts federal rights under Perry v. Sinderman, 92 S.Ct. 2717 (1972), and its companion case of Board of Regents v. Roth, 408 U.S. 564 (1972), has not been conclusively decided in the instant matter. Further, the law set forth in State v. Schmid, 84 N.J. 535 (1980), 423 A.2d 615 (1980), 455 U.S. 100 (1982), involving protection of freedom of speech in the context of a private university has not been reviewed for its application to the instant matter and the denial of due process at a private university with respect to academic freedom and tenure. Here, FDU enjoys the benefits of federal funding, thus placing the University within the ambit of federal law, a matter raised before the Appellate Division. Any claim to immunity was lost in Healy v. James, 408 U.S. 39 (1972); where the Court declared that colleges and universities are not enclaves immune from the sweep of the First Amendment.

The Appellate Division's short review of Perry v. Sinderman in distinguishing it away based upon the public or private nature of the institution, without apparent consideration of the relevant case law cited (Bloomfield College), and distinguishing it away based upon the existence of a formal tenure procedure method which it indicated had controlling application in the instant case though never accorded plaintiff by the university, fails to address the court's deprivation of plaintiff's constitutional right of due process of law in the case with respect to the contractual procedures affecting serious liberty and property interests, that he was entitled to by virtue of his faculty status which the jury found to exist and which the private university had incorrectly denied. Compounding the harm caused by this loss of contractual procedure is its effect on his prospects for employment in both public and private colleges and universities which, like FDU, subscribe to the national and generally accepted provisions of the 1940 Statement of Principles on Academic Freedom and Tenure. Unlike in Roth, plaintiff herein is quite concerned about the stigma left to his teaching credentials, having served well beyond the probationary period for tenure to attach yet not being accorded same under the Trial Judge's decision, affecting his good name, reputation and professional standing in academia (public and private). Underlying all of this is the need to relate to academic tenure and the protection of academic freedom, and hence how it may be acquired after the passage of time, so as to assure freedom of speech and expression in the educational endeavor without fear of retribution. Unfortunately, these issues were not decided by the New Jersey courts, although briefed there.

Freedom of speech is secured by the First Amendment of the U.S. Constitution from abridgment by the United States and is similarly secured to all persons by the

Fourteenth Amendment against abridgment by a state. Schneider v. State, 308 U.S. 147, 160 (1939). Furthermore, one's interest in one's livelihood is a protectable property right or interest in the due process context. Willner v. Committee on Character and Fitness, 373 U.S. 96, 103 (1963). The Fourteenth Amendment prohibition against depriving a person of life, liberty or property without due process of law extends to all acts of the state, including that of its judicial authorities. Indeed, the state courts may not "annul or evade" this constitutional prohibition of the Fourteenth Amendment. Chicago, Burlington & Quincy Railraod Co. v. Chicago, 166 U.S. 226, 234 (1897).

In this case, the New Jersey courts have dismissed plaintiff's action seeking protection of his academic freedom (freedom of speech) and his property rights in his livelihood, without according him complete due process of law, and without recognizing the rights he has as a faculty member as found by the jury and as provided in his contract with defendant University. They have effectively evaded their responsibility to him to accord him due process of law as required by the U.S. Constitution.

Failure to provide such review infringed upon Healy's First and Fourteenth Amendment rights under the Federal Constitution; see Cohen v. California, 403 U.S. 15 (1971). In Chapman v. Crane, (n. Goodnow), 123 U.S. 540 (1887), the Court held that a decision that avoids reference to the Federal question is a determination against the right claimed as though it had been directly refused. In Williams v. State of Georgia, 349 U.S. 375 (1955), the Court held that a state court may not decline to entertain constitutional claims while ruling on kindred issues.

There is no indication from the rulings in the New Jersey

State courts to shed light on their reasonings for not considering the state and federal constitutional issues raised. By virtue of such determinations not to review these elements, there emerges the question as to whether or not the courts sought to lessen or deny such rights as being regulated by state rules of practice; albeit not defined. If such a determination was made to restrict review of the points of contention raised in Healy's appellate brief, then the action would be counter to your ruling in Atlantic Coast Line R. Co. v. Mims, 242 U.S. 532 (1917).

In Staub v. Baxley, 355 U.S. 313 (1958), the Court proclaimed that:

> Whether federal constitution rights asserted by the litigant in a state court were given due recognition by that court is a question to which the litigant is entitled to invoke the judgment of the U.S. Supreme Court, by way of appeal thereto; it is then within the province of the Supreme Court to inquire not only whether the right was denied, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support.

Herb v. Pitcairn, 324 U.S. 117 (1945) raises the issue and prospect of wrong judgments, as alleged here, where the State courts have taken an erroneous view of federal law and the rights of the petitioner that are being sought. This case further illustrates the value of the U.S. Supreme Court as a safety net to safeguard the constitutional claims of petitioner seen to be harmed by State court oversight.

Whether by avoidance or through refusal to hear and accord the substantive State and Federal protections and claims sought by Healy at trial and in his appeals, the New Jersey State courts disregarded much of the law and literature on higher educational and constitutional due process (Bender, Matthew, Education Law, n.p.: Times Mirror Books, Vol 2, 1991.) and tenure entitlement (Perry v. Sinderman).

The Perry case revealed the Court's finding that an entitlement existed through an official school faculty guide which could reasonably be interpreted to create a de facto tenure system. Justice Stewart said that property interests can arise from "mutually explicit understandings" that support a claim of entitlement. The honorable Justice opined, "A teacher, like the respondent [Perry] who has held his position for a number of years...that he has a legitimate claim of entitlement to tenure." A common thread exists here between the Perry interpretation by the Court and petitioner's claims for constitutional safeguards accorded him under the AAUP-FDU Agreement, the 1988 Faculty Handbook, and the 1940 Statement, but denied him by fiat.

Duke law professor William W. Van Alstyne, in (Brown), Law and Contemporary Problems, defines tenure as not a guarantee of life employment:

> Rather, tenure provides only that no person continuously retained as a full-time faculty member beyond a specific period of probationary service may thereafter be dismissed without adequate cause.

The Preface to the 1940 Statement of Principles on Academic Freedom and Tenure endorses the notion of institutions of higher education being conducted for the

"common good" and states "Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society." The reason for tenure as a means to assure freedom of teaching is specifically set forth therein. FDU has affirmatively associated itself to this system and procedure regarding academic freedom and tenure, which is a national approach interrelating faculty tenure rights with respect to both public and private colleges and universities. Through such a commitment, FDU is seen as obligated to avail to petitioner his entitlement to the procedures and substance thereof, including tenure de facto by passage of time in teaching service and including tenure by procedure under peer review within the collegial system in academia. The significance of the general public importance of the concept of academic freedom is captured by Justice Brennan in Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) in which he proffers:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us....That freedom is therefore of special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Validated by the foregoing, the petitioner is of the belief that his fundamental personal rights, including freedom of speech of the First Amendment, as protected under the Fourteenth Amendment from deprivation by the states without due process of law, have been blatantly denied him through foreclosure by the New Jersey courts consistently avoiding the various constitutional and due process issues advanced in the initial complaint to the Trial Court, and

expressly highlighted in the appeals to the Appellate Division, and the Supreme Court of New Jersey.

Healy's inability to appear before a panel of his peers, as expressly provided by contract, to defend himself against incorrect, unilateral and detrimental decisions that have since deprived him of his constitutional rights and liberty interests in his livelihood as an educator in the exercise of responsible teaching and expression, so as to clear his name and restore him to his earned and rightful position in academia and the community as a teacher, published scholar, and 1990 Nobel Peace Candidate Nominee is of importance not only to him in removing the stigma cast upon his reputation, but is also of imperative public importance in assuring the integrity of the educational endeavor. Unfortunately, in the instant case, the courts have failed to date to review the relationship between academic tenure and academic freedom, ignoring that Healy's expressions and actions on behalf of students and alumni, against improper behavior by a fellow faculty member, eventually led to the loss of his livelihood and career.

CONCLUSION

The honorable U.S. Supreme Court is being asked to decide a significant case, thought to be of first impression, with respect to constitutional due process in the relationship between academic freedom and tenure, as nationally applied through the adherence by public and private colleges and universities under the 1940 Statement of Principles on Academic Freedom and Tenure. The petition for writ of certiorari should be granted, and the judgment should be reversed.

Dated September 18, 1996

Respectfully submitted,

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JAMES B. HEALY	SUPREME COURT OF
Plaintiff-Petitioner,	NEW JERSEY DOCKET NO. 41,914
vs.	CIVIL ACTION
FAIRLEIGH DICKINSON UNIVERSITY, FRANCIS J. MERTZ, NANCY S. BARRETT, MORDECHAI ROZANSKI	MOTION FOR RECONSIDERATION
Defendants-Respondents.	PURSUANT TO R.2:11-6

JAMES B. HEALY, Plaintiff-Petitioner herein, received on June 10, 1996, the decision of the honorable Supreme Court, filed June 5, 1996, denying his petition for certification to review the judgment of the Superior Court, Appellate Division in Docket No. A-6906-93. Pursuant to R:11-6 and applicable substantive and procedural law, the Plaintiff-Petitioner respectfully MOVES for reconsideration of the petition for certification and also MOVES that the matter be remanded for an order in supplementation of the Appellate Division's judgment, requiring, as a matter of due

process that Defendant-Respondent Fairleigh Dickinson University accord Plaintiff-Petitioner the tenure hearing, peer review and tenure process, the formal tenure system or procedure which the Appellate Division has indicated in its opinion is applicable. The latter motion is made pursuant to state and federal constitutional law and under the honorable Court's decision in Nicoletta v. No. Jersey District Water Supply Commission, 77 N.J. 145 (1978).

The motions herein are made so as to avoid a manifest injustice to Plaintiff Healy which would occur in allowing the decision of the Appellate Division to stand unchanged, since that decision fails to resolve completely the case and controversy surrounding Healy's tenure status, which impacts his search for prospective employment in academe. Since his separation from Fairleigh Dickinson University, Healy has been seriously harmed in securing employment in his chosen field as an educator at the college orf university level.

Healy was found by the jury to be a full-time faculty member at Fairleigh Dickinson University. The trial judge and Appellate Division would not make a finding that he had tenure. The Appellate Division decision indicates that the formal tenure process of the University is applicable and not tenure de facto or other tenure provisions of Healy's contract with the University. The University did not accord Healy this applicable formal tenure process (which includes peer review), and the Appellate Division did not order the University to provide this process to him. Though his full-time faculty status has been upheld by the jury and the courts, his tenure status has not been determined because the University failed to accord him the formal tenure process and because the University had held an erroneous view that he

was not in faculty status. Thus Healy's tenure is not resolved, in the absence of the formal tenure review process at Fairleigh Dickinson University.

Because of the unique practices in academe, whereby universities and colleges commonly and typically recognize tenure status granted to individual faculty members and often give such some standing upon the hiring of faculty who were tenured elsewhere (essentially a system of "comity" among institutions of higher learning), resolution of Healy's tenure status at Fairleigh Dickinson University is important to him in his search for employment at other universities and colleges, public and private, in New Jersey and elsewhere in the nation. (See pp. 18-19 of Plaintiff's Brief in support of Petition for Certification before the Supreme Court and the 1940 Statement of Principles on Academic Freedom and Tenure found at p. 118 of Plaintiff's Appendix in the Appellate Division.)

Plaintiff Healy has briefed the various due process considerations under state and federal constitutional law in his earlier filings with the honorable Supreme Court, and incorporates same herein by reference. Certifications, as requested herein in the first motion for reconsideration, would permit disposition of these important constitutional issues and all issues of the case. Remand of the case to the Appellate Division with a determination for an order requiring due process for Plaintiff regarding tenure status, as requested herein in the second motion, would at least allow certain constitutional rights of Plaintiff to be addressed relative to his livelihood, career, professional standing and future employment. Thus, fair and impartial peer review, accorded under the formal tenure process of the University,

should be ordered so that the cloud, caused by the lack of proper proceedings, on Plaintiff's tenure status and professional credentials as an educator may be lifted, allowing for the removal of this impairment on his future employability in academe. In accordance with Nicoletta vs. No. Jersey District Water Supply Commission, 77 N.J. 145 (1978), the State courts, as guardians of personal constitutional rights and liberty, are asked to assure that Healy receives proper due process so that his ability to seek prospective employment in both public and private institutions of higher learning, in this and other states, is not harmed because of the incomplete proceedings to date in the matter.

CONCLUSION

Wherefore, Plaintiff prays, for the reasons set forth herein, that this honorable Court reconsider and grant certification for review of all issues in the matter and that the honorable Court reconsider and at least remand the matter for supplementation of the decision of the Superior Court, Appellate Division, with an order requiring due process in a fair and impartial University tenure hearing with peer review comporting with the Appellate Division's decision. Plaintiff prays for such other relief as the honorable Supreme Court may deem just and proper.

/s/ Timothy R. Hott
TIMOTHY R. HOTT
Attorney for Petitioner

Dated: 6/18/96

SUPREME COURT OF NEW JERSEY
C-1100 September Term 1995
41,914

JAMES B. HEALY
Plaintiff-Petitioner,
v.

FAIRLEIGH DICKINSON UNIVERSITY
Defendant-Respondent.
and

FRANCIS J. MERTZ, et al.,
Defendants.

ON PETITION FOR CERTIFICATION

(Filed June 5, 1996)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6906-93 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Alan B. Handler, Presiding Justice, at Trenton, this 4th day of June, 1996.

/s/ (illegible)
CLERK OF THE SUPREME COURT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-6906-93T2

JAMES B. HEALY
Plaintiff-Appellant,

v.

FAIRLEIGH DICKINSON
UNIVERSITY
Defendant-Respondent.
and
FRANCIS J. MERTZ, NANCY S.
BARRETT, MORDECHAI ROZANSKI,
Defendants.

(Filed
Feb. 20, 1996)

Argued December 5, 1995 - Decided Feb. 20, 1996

Before Judges Pressler, Keefe and Wefing.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County.

Timothy R. Hott argued the cause for appellant (Hott & Margolis, attorneys).

Maurice J. Nelligan, Jr. argued the cause for respondents (Apruzzese, McDermott, Mastro & Murphy, attorneys).

The opinion of the court was delivered by
KEEFE, J.A.D.

Plaintiff, James B. Healy (Healy), appeals only from that part of a final judgment which determined, as a matter of law that he did not acquire de facto tenure at defendant Fairleigh Dickinson University (University). Consequently, this appeal only involves the complaint brought by Healy against the University. We affirm.

In 1980, Healy became a full time faculty member of the University with the rank of adjunct associate professor. His one year contract for the academic year 1980-1981 incorporated the terms of the University's collective bargaining agreement with the American Association of University Professors' contract (the AAUP contract). Thereafter, Healy received a series of one year probationary contracts through the academic year 1984-85. During that period, Healy requested promotion to full professor and was denied the promotion because he lacked a doctorate degree. The lack of the doctorate and his failure to publish were cited in 1984 memos issued by his supervising dean as reasons why Healy could not gain tenure under the AAUP contract. Healy received copies of those memos.

Healy's appointment for his sixth academic year (1985-86) was different from the prior years in that the letter of appointment notified him that his position as associate professor was a "non-tenured position." Healy registered no complaint over that designation.

At the conclusion of 1985-86 academic year, Healy received notice that he would be a senior administrator with the rank of associate dean. However, his appointment required that he also teach three credits per semester without additional compensation. Unlike faculty members who were

on a monthly payroll, Healy was paid semi-monthly as were other administrators.

As a senior administrator, Healy was subject to annual performance evaluations. The evaluation for his final year at the University showed that his overall performance was "significantly below expectations." On that basis he was discharged in June 1990. Healy maintained that he could not be discharged because he had acquired de facto tenure under the provisions of the AAUP contract and its successor, the 1988 Faculty Handbook (the Handbook) which contained essentially the same provisions for acquiring tenure.

Both the AAUP contract and the Handbook provide, among other things respecting tenure, that a faculty member who completes a probationary period of fourteen continuous academic semesters as a full-time professor shall have tenure upon reaching the next academic semester following the completion of such probationary period. Because of Healy's role as an administrator/instructor beginning in 1986-87, there was a factual dispute as to whether he had served the requisite number of years as a faculty member under the above provision. The jury resolved that issue in Healy's favor.

However, the University maintained that the resolution of that factual dispute was irrelevant to the question of whether Healy had obtained tenure. The University maintained that the clause relied upon by Healy to assert de facto tenure was not inserted in the contract for that purpose. It argued that tenure could not be obtained absent an affirmative grant of tenure by the University in accord with well defined procedures set forth both in the AAUP contract

and the Handbook.

In a post-jury verdict bench opinion, the trial judge agreed with the University. She concluded that the evidence revealed that the AAUP contract and Handbook provisions dealing with tenure were not ambiguous and that their interpretation was a legal question which only the court could resolve. As such, the trial judge concluded that Healy's reliance on the previously cited provision of the AAUP contract and Handbook was misplaced, and that de facto tenure could not be attained at the University.

On appeal Healy contends that the judge erred in: (1) substituting her decision for the jury's verdict; (2) disregarding the testimony of his expert witness; and (3) interpreting the AAUP contract and the Handbook provisions under relevant case law and applicable contract construction principles so as to conclude that he did not have tenure.

I

Healy maintains that the trial judge's determination that he did not have tenure ignored the jury's verdict in his favor on the tenure issue and is the equivalent of a judgment notwithstanding the verdict. Thus, Healy implicitly contends that the entire tenure issue was before the jury.

Healy's contention is clearly wrong. The record reflects that the judge determined that the tenure issue was a mixed question of fact and law because his claim of de facto tenure involved a determination of the number of semesters he was employed as a faculty member (the fact issue), as well as an interpretation of the AAUP contract and the Handbook

provision upon which he relied to support his contention that he had acquired de facto tenure (the legal issue). As to the latter issue, the judge determined, and Healy conceded, that the provisions were not ambiguous, and thus, their interpretation was a question of law for the court.

Although the judge did not say so specifically, she apparently reasoned that if the jury resolved the fact issue against Healy, there would be no need for her to construe the contract because the factual predicate for Healy's alleged contract right would not then exist. Consequently, she elected to have the jury answer the fact issue first. The jury was not asked to determine if plaintiff had tenure, but rather was only asked to determine the length of plaintiff's service as a faculty member. This point is made clear in the judge's following response to a jury question.

> The only question you have before you is whether or not Mr. Healy served starting with the 15th consecutive [semester] as a faculty person. Tenure is not a question you're going to determine. You're only going to determine that fact. Was he faculty? Did he serve as faculty for the 15 consecutive [semesters]? That's on the tenure question, so you-so whether or not that means a contract for Mr. Healy is not something you're going to decide.

II

Healy next contends that the trial judge erred in

disregarding the testimony of his expert witness on academic tenure. Dr. Koster opined that based upon his "reading" of the Handbook, Healy had acquired tenure by virtue of his length of service. By admitting Koster's testimony into evidence, Healy argues that the trial judge implicitly conceded that the issue was one for the jury to decide. We reject that contention.

By the end of the trial, it was clear that there was no ambiguity in either the AAUP contract or the Handbook in respect of the clause upon which Healy relied to assert de facto tenure.

The undisputed testimony at trial showed that the subject provision had originated during the time when there was collective bargaining between the faculty union and the University. The provision had been proposed as a means of determining exactly when the award of tenure became effective for those faculty who had been hired in the middle of an academic year. Earlier labor agreements had simply referred to a seven year probationary term which left unanswered when the award of tenure became effective if one were hired in January of an academic year. The switch to fourteen continuous semesters clearly defined exactly when tenure attached. After the demise of collective bargaining, the same provision was carried forward into the Handbook.

Under our evidence rules, expert testimony is admissible only where it "will assist the trier of fact . . . ." N.J.R.E. 702. Expert witnesses simply may not render opinions on matters which involve a question of law. See, e.g. Marx & Co., Inc. v. Diners' Club Inc., 550 F.2d 505 (2nd Cir.), cert. denied, 434 U.S. 861, 98 S. Ct. 188, 54 L. Ed. 134

(1977) (holding that it was error for the trial court to allow a lawyer/witness to render his opinion on the legal significance of certain contract terms, and the legal obligations arising therefrom). State v. Grimes, 235 N.J. Super. 75, 79 (App. Div.), certif. denied, 118 N.J. 222 (1989) (holding expert opinion is not admissible concerning the domestic law of the forum). Therefore, once the trial court correctly determined that the interpretation of the contract language was a legal matter, she was obligated to disregard the expert's opinion concerning its interpretation. The question before the court was not whether hypothetically there can be de facto tenure. The question was whether the parties provided for it.

III

We are satisfied that the trial judge properly applied the rules of contract construction in arriving at her conclusion that de facto tenure was not provided for in the AAUP contract or the Handbook.

Healy's reliance upon Dugan v. Stockton State College, 245 N.J. Super. 567 (App. Div 1991); Perry v. Sindermann, 408 U.S. 593, 92 St. Ct. 2694, 33 L. Ed.2d 570 (1972); and Kovats v. Rutgers University, 633 F. Supp. 1469 (D.N.J. 1986), remanded, 822 F.2d 1303 (3rd Cir. 1987), to support his contention that New Jersey law permits the acquisition of tenure at a private university by virtue of length of service is misplaced. In Dugan, we held that a state college employee who met the statutory prerequisites for tenure under the State and County College Tenure Act, N.J.S.A. 18A:60-62-15, automatically acquired tenure by operation of law without further participation by the board of trustees. Id. at 573.

The decision rested solely on the fact that tenure was governed by the provisions of the statute. Ibid. Thus, the cases are completely distinguishable.

Perry, supra, is also clearly distinguishable. In that case, plaintiff was a professor at a state junior college which had no formal tenure system. 408 U.S. at 594, 91 St. Ct. 2696, 33 L. Ed.2d 575. The Supreme Court simply held that a teacher employed for a number of years at the same institution should be permitted to show that, while no explicit tenure system existed, a de facto tenure system did exist at the institution. Id. at 602, 92 S. Ct. 2700, 33 L. Ed.2d 580. Here, unlike Perry, the University has a formal, established tenure procedure set forth in detail in the AAUP contract and the successor Handbook. Furthermore, Perry involved a public institution, thereby implicating the Fourteenth Amendment. The University here is a private institution.

Finally, Kovats, supra, is of no assistance to Healy. The Third Circuit opinion simply stands for the proposition that the question of whether the professors involved in that case had acquired de facto tenure under a university regulation based upon their length of service was a triable issue of fact. 822 F.2d at 1313-1315. As the University points out in its brief, on remand, Judge Debevoise in an unpublished opinion, using an analysis strikingly similar to the one used by the trial judge in this case, concluded that a Rutgers faculty member does not have an automatic right to tenure if he or she is reappointed for a term extending beyond the probationary term defined in the regulation. The reason for the judge's conclusion was that such a result would be inconsistent with the detailed evaluation procedures set forth in the regulation. Although Judge Debevoise's resolution of

an analogous issue is not binding on us, it is nonetheless helpful in resolving this appeal. Healy's reply brief offers no meaningful response to the defendant's exposition of the manner in which a similar issue to the one at hand was ultimately resolved by another trial court.

In Newark Publisher's Assoc. v. Newark Typographical Union, 22 N.J. 419 (1956), our Supreme Court established a principle of contract interpretation that undoubtedly guided both Judge Debevoise and the trial judge in this case:

> A subsidiary provision is not so to be interpreted as to conflict with the obvious "dominant" or "principal" purpose of the contract. We seek for the intention of the parties; and to this end the writing is to have a reasonable interpretation. Disproportionate emphasis upon a word or a clause or a single provision does not serve the purpose of interpretation . . . . [T]hus the literal sense of terms may be qualified by the context.
>
> * * *
>
> Evidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement, even where the contract is free from ambiguity. not for the purpose of changing the writing, but to secure light by which its actual significance may be measured.
> [Id. at 426-27].

Applying these principles to the matter under consideration, we conclude that Healy's "disproportionate emphasis upon . . . a single [Handbook] provision" to support his tenure claim "*does not serve the purpose of interpretation.*" Id. at 426. In addition, the interpretation of the probationary appointments provision urged by Healy "conflict[s] with the 'dominant' or 'principal' purpose of the [tenure policy]," which places substantive and procedural prerequisites on the acquisition of tenure. Ibid. Moreover, in respect of how the parties conducted themselves pursuant to the AAUP contract and the Handbook, the record reflects that no one at the University had ever acquired tenure absent an affirmative grant of tenure by the Board of Trustees.

The judgement under review is affirmed.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BERGEN COUNTY
HACKENSACK, NEW JERSEY
DOCKET NO. BER-L-16549-90

JAMES HEALY
Plaintiff

vs

FAIRLEIGH DICKINSON UNIVERSITY
Defendant

TRANSCRIPT OF PROCEEDINGS

DECISION

PLACE: Bergen County Courthouse
Hackensack, New Jersey
DATE: June 21, 1994
Volume 11 of 11

BEFORE: HON. ISABEL B. STARK, J.S.C.

TRANSCRIPT REQUESTED BY: TIMOTHY HOTT, Esq
(Hott and Margolis 501 Summit Ave.
Jersey City, NJ 07306)

APPEARANCES: Timothy R. Hott, Esq.
(Hott & Margolis)
Attorney for Plaintiff
Maurice J. Nelligan, Esq.
(Apruzzese McDermott)
Attorney for Defendant

THE COURT: Appearances please. This is on Healy versus Fairleigh Dickinson.

Mr. HOTT: Timothy Hott, H-O-T-T for the plaintiff, James Healy.

Mr. NELLIGAN: For the defendant University, Mike Nelligan.

THE COURT: All right. I'm sorry it took so long, gentlemen, to put this together, but the ultimate result I'd have to tell you up front is that there is no tenure. So, I'll tell you the reasons that I have come to that conclusion.

Now, the jury found con -- found no contract violations pertaining to the written documents of reemploying plaintiff. Healy, for a certain salary each year and denoting his -- him as an administrator who could be fired with requisite notice. The only open question is whether Mr. Healy acquired de facto tenure at defendant Fairleigh Dickinson University, which, of course, is a private college. And the question about tenure deals with only his status as quote faculty. The jury did find that Mr. Healy was employed as faculty for fifteen consecutive semesters and that's why it then became a question for the court to decide.

Since plaintiff worked at a private college, the Court is satisfied that Dugan versus Stockton State College, at two, four, five, New Jersey Super five, six, seven, Appellate Division, nineteen ninety one, is inapplicable. It provides no precedent to the within facts and or proceedings. Dugan rested on the fact that public colleges and tenure of their

faculty is controlled by statute, namely NJSA18A:60-6. Private colleges are not under any such statutory strictures. They are controlled by contract precepts.

Plaintiff Healy asserts that he was not an employee at will, even if his written employment contracts specified one year administrative reappointment- -rather appointments-- and did not acknowledge any faculty status. Plaintiff's position is that he acquired automatic faculty tenure pursuant to one line in paragraph 4.2 of the probationary appointments section of the faculty handbook that controlled tenure at Fairleigh Dickinson University. That one line reads as follows: "A faculty member who completes a probationary period of fourteen academic semesters of continuous, active, full time contractual service shall have tenure effective with the first day of contractual service of the next academic semester following the completion of such probationary period".

Plaintiff states that this section of the handbook was an offer by Fairleigh Dickinson University, that coupled with plaintiff's reasonable expectations of continued facu -- faculty employment after his fifteenth semester are sufficient, pursuant to Wooley (phonetic) versus Hoffman LaRoche, Inc., ninety nine New Jersey two, eight, four, nineteen eighty five, to have formed a contract that defendant, Fairleigh Dickinson, breached when they fired him.

The Court disagrees and finds that the most fundamental concepts of contract law are absent here. Wooley and its progeny articulate a standard that applies to persons without written or oral contract. Now, plaintiff, in this instance, had a yearly contract as an administrator, pursuant to which he had some teaching duties. Even if his

title should have been, quote, faculty, unquote, and he met the employers one proviso of teaching fifteen consecutive semesters, he met none of the other criteria enunciated in the three complete articles that control tenure, namely articles three, four, and five of the --at Fairleigh Dickinson faculty handbook.

Most particularly, not a single person, in the history of Fairleigh Dickinson, was every given de facto fac -- faculty tenure. The reason is patent. All parties, clearly, knew -- that is parties to this case -- clearly knew or had to know that a full reading of the tenure provisions imparts affirmative duties to act on both the part of the applicant and the college.

None of the academic prerequisites had been met by plaintiff and, in addition, plaintiff had lied as to his academic credentials. None of the procedural prerequisites had been met either. For instance, there was no writing to apply for -- - for plaintiff applying for tenure status and he received written contracts each year just as a salary letter. Section 5.2B - that's of the faculty handbook and he was notified in writing, that he would not be reappointed as faculty before his fifteenth semester, but did nothing to pursue remedies at that time.

Plaintiff does not allege any fraud or that he was mislead by continuing his employment with Fairleigh Dickinson, as an administrator rather than faculty. He now asks that The Court disregard his express bilateral contract with defendant, FDU, and substitute for it a better unilateral contract of lifetime employment. But, not only doesn't plaintiff have any proofs that he at any time relied on defendant's handbook for lifetime, he doesn't assert that anything in the

defendant's history would impart a factual setting for such reliance and furthermore, assuming the faculty handbook did present an offer by defendant, FDU, plaintiff failed to give the requisite consideration to completing the contract, namely all the items that are enunciated in the handbook at article three point -- section 3.3.

That failure, coupled with defendant, Fairleigh Dickinson's expressly notifying him that he was being removed from the faculty tenure track leave no doubt that plaintiff has no claim for contract de facto tenure. Absent statute The Court is, therefore, compelled to dismiss with prejudice plaintiff's final claim in the within case, and an order will be entered up submission. Are there any questions from either side?

MR. HOTT: I just have one, Your Honor. On the last item where you said, "Coupled with a notice that the defendant gave to the plaintiff that he was being removed from faculty status".

THE COURT: No. I -- I think I said it the other way. If I didn't, I made a mistake. Let's see where it is -- where I wrote that.

MR. HOTT: The very end. (Unintelligible) gives requisite consideration --

THE COURT: Yeah. Plaintiff failed to give the requisite consideration to complete a unilateral contract, namely that he didn't fulfill all the prerequisites that are noted in three point three. That failure coupled with defendant, Fairleigh Dickinson, having expressly notified

plaintiff, that he was being removed from the faculty tenure track. That's what I said.

MR. HOTT: Okay. That -- what I -- that was the question I wanted to ask. What -- were you referring to?

THE COURT: Oh. There was a -- piece of evidence, the number of which now escapes men, that indicates that in his file -- his personnel file -- there was a written memo indicating that he was being changed from the faculty track to the administrative track at the time that occurred. That's what I'm referring to.

MR. HOTT: I have another question. I assume we'll also get a copy of the written opinion.

THE COURT: No. This -- I -- this is a handwritten opinion, by me, and this has been on the record, so -

MR. HOTT: Okay.

THE COURT: -- you may order that -- the small portion of the record that encompasses this opinion.

MR. NELLIGAN: Who is that individual we talk to there, Judge?

THE COURT: That would be Jean Jadavia (phonetic), my court clerk. I think -- or I think maybe it's now a centralized format, so you have to talk to Harry Fredericks.

MR. NELLIGAN: Harry Fredericks. That's right,

Harry Fredericks. Okay.

THE COURT: Okay. Any other questions. Thank you.

MR. NELLIGAN: Okay, Your Honor.

THE COURT: All right. Bye now.

CERTIFICATION

I, Sharon Cooper, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Bergen County Court on June 21, 1994, Tape No. 230-94, Index No. 4061 to 4922, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate record of the proceedings to the best of my knowledge and ability.

/s/ Sharon Cooper
SHARON COOPER AOC #395
Kemco Transcription, Inc.

Date: 11/17/94

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:
BERGEN COUNTY
Docket No. BER-L-16549-90

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JAMES B. HEALY,
Plaintiff,

v.

FAIRLEIGH DICKINSON UNIVERSITY, FRANCIS J. MERTZ, NANCY S. BARRETT, MORDECHAI ROZANSKI,
Defendants.

CIVIL ACTION

ORDER

(Filed with the Court
Aug. 1, 1994
Isabel Brawler
Stark, JSC)

THIS MATTER having been tried to a jury in March of 1994, and the jury in March 25, 1994 having returned a verdict in favor of defendants on all Counts of the Complaint and the Court having rendered its findings on June 21, 1994

IT IS HEREBY ORDERED this 1st day of August, 1994, that all Counts of plaintiff's Complaint be and hereby are dismissed with prejudice.

/s/ Isabel B. Stark, J.S.C
Isabel B. Stark, J.S.C.

1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE

With 1970 Interpretive Comments

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement is known to the profession as the 1940 Statement of Principles on Academic Freedom and Tenure.

The 1940 Statement is printed below, followed by Interpretive Comments as developed by representatives of the American Association of University Professors and the Association of American Colleges during 1969. The governing bodies of the associations, meeting respectively in November 1989 and January 1990, adopted several changes in language in order to remove gender-specific references from the original text.

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of high education are conducted for the common good and not to further the interest of either the individual teacher(*) or the institution as a whole. The common good depends upon the free search for truth and its

free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights. [1] (**)

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

ACADEMIC FREEDOM

(a) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(*) The word "teacher" as used in this document is understood to include the investigator who is attached to an academic institution with teaching duties.

(**) Bold-face numbers in brackets refer to Interpretive Comments which follow.

(b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. [2] Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment. [3]

(c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution. [4]

ACADEMIC TENURE

After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under

extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

1. The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

2. Beginning with appointment to the rank of full-time instructor or a higher rank, [5] the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that the new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. [6] Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period. [7]

3. During the probationary period a teacher should have the academic freedom that all other members of the faculty have. [8]

4. Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges and should have the opportunity to be heard in his or her own defense by all bodies that pass judgment upon the case. The teacher should be permitted to be accompanied by an advisor of his or her own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from the teacher's own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their Salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution. [9]

5. Termination of a continuous appointment because of financial exigency should be demonstrably **bona fide**.

1940 INTERPRETATIONS

At the conference of representatives of the American Association of University Professors and of the Association of American Colleges on November 7-8, 1940, the following interpretations of the 1940 **Statement of Principles on Academic Freedom and Tenure** were agreed upon:

1. That its operation should not be retroactive.

2. That all tenure claims of teachers appointed prior to the endorsement should be determined in accordance with the principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure.

3. If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph (c) of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it may proceed to file charges under paragraph (a)(4) of the section on Academic Tenure. In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

1970 INTERPRETIVE COMMENTS

Following extensive discussions on the 1940 Statement of Principles on Academic Freedom and Tenure with leading educational associations and with individual faculty members and administrators, a joint committee of the AAUP and the Association of American Colleges met during 1969 to reevaluate this key policy statement. On the basis of the comments received, and the discussions that ensued, the joint committee felt the preferable approach was to formulate

interpretations of the Statement in terms of the experience gained in implementing and applying the Statement for over thirty years and of adapting it to current needs.

The committee submitted to the two associations for their consideration the following "Interpretive Comments." These interpretations were adopted by the Council of the American Association of University Professors in April 1970 and endorsed by the Fifty-sixth Annual Meeting as Association policy.

In the thirty years since their promulgation, the principles of the **1940 Statement of Principles on Academic Freedom and Tenure** have undergone a substantial amount of refinement. This has evolved through a variety of processes, including customary acceptance, understandings mutually arrived at between institutions and professors or their representatives, investigations and reports by the American Association of University Professors, and formulations of statements by that association either alone or in conjunction with the Association of American Colleges. These comments represent the attempt of the two associations, as the original sponsors of the **1940 Statement**, to formulate the most important of these refinements. Their incorporation here as Interpretive Comments is based upon the premise that the **1940 Statement** is not a static code but a fundamental document designed to set a framework of norms to guide adaptations to changing times and circumstances.

Also, there have been relevant developments in the law itself reflecting a growing insistence by the courts on due process within the academic community which parallels the

essential concepts of the **1940 Statement**; particularly relevant is the identification by the Supreme Court of academic freedom as a right protected by the First Amendment. As the Supreme Court said in Keyishian v. Board of Regents, 385 U.S. 589 (1967), "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

The numbers refer to the designated portion of the **1940 Statement** on which interpretive comment is made.

1. The Association of American Colleges and the American Association of University Professors have long recognized that membership in the academic profession carries with it special responsibilities. Both associations either separately or jointly have consistently affirmed these responsibilities in major policy statements, providing guidance to professors in their utterances as citizens, in the exercise of their responsibilities to the institution and to students, and in their conduct when resigning from their institution or when undertaking government-sponsored research. Of particular relevance is the **Statement on Professional Ethics**, adopted in 1966 as Association policy. (A revision, adopted in 1987, was published in Academe: Bulletin of the AAUP 73 [July-August 1987]: 49.)

2. The intent of this statement is not to discourage what is "controversial." Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for

teachers to avoid persistently intruding material which has no relation to their subject.

3. Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the **1940 Statement**, and we do not now endorse such a departure.

4. This paragraph is the subject of an Interpretation adopted by the sponsors of the **1940 Statement** immediately following its endorsement which reads as follows:

> If the administration of a college or university feels that a teacher had not observed the admonitions of paragraph (c) of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it may proceed to file charges under paragraph (a)(4) of the section on Academic Tenure. In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

Paragraph (c) of the **1940 Statement** should also be interpreted in keeping with the 1964 "Committee A Statement on Extramural Utterances" (AAUP Bulletin 51 [1965]:29), which states **inter alia**, "The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it

clearly demonstrates the faculty member's unfitness for his or her position. Extramural utterances rarely bear upon the faculty member's fitness for the position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar."

Paragraph V of the **Statement on Professional Ethics** also deals with the nature of the "special obligations" of the teacher. The paragraph reads as follows:

> As members of their community, professors have the rights and obligations of other citizens. Professors measure the urgency of other obligations in the light of their responsibilities to their subject, to their students, to their profession, and to their institution. When they speak or act as private persons they avoid creating the impression of speaking or acting for their college or university. As citizens engaged in a profession that depends upon freedom for its health and integrity, professors have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.

Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time probationary as well to the tenured teacher, but also to all others, such as part-time faculty and teaching assistants, who exercise teaching responsibilities.

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*For a discussion of this question, see the "Report of the Special Committee on Academic Personnel Ineligible for tenure," **AAUP Bulletin 52** (1966): 280-282.

5. The concept of "rank of full-time instructor or a higher rank" is intended to include any person who teaches a full-time load regardless of teacher's specific title.*

6. In calling for an agreement "in writing" on the amount of credit for a faculty member's prior service at other institutions, the **Statement** furthers the general policy of full understanding by the professor of the terms and conditions of the appointment. It does not necessarily follow that a professor's tenure rights have been violated because of the absence of a written agreement on this matter. Nonetheless, especially because of the variation in permissible institutional practices, a written understanding concerning these matters at the time of appointment is particularly appropriate and advantageous to both the individual and the institution. **

7. The effect of this subparagraph is that a decision on tenure, favorable or unfavorable, must be made at least twelve months prior to the completion of the probationary period. If the decision is negative, the appointment for the following year becomes a terminal one. If the decision is affirmative, the provisions in the **1940 Statement** with respect to the termination of services of teachers or investigators after the expiration of a probationary period should apply from the date when the favorable decision is made.

For a more detailed statement on this question, see "On Crediting Prior Service Elsewhere as Part of the Probationary Period," **AAUP Bulletin 64 (1978): 274-75.

The general principle of notice contained in this paragraph is developed with greater specificity in the **Standards for Notice or Nonreappointment**, endorsed by the Fiftieth Annual Meeting of the American Association of University Professors (1964). These standards are:

Notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should be given in writing in accordance with the following standards:

> (1) **Not later than March 1 of the first academic year of service**, if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.
>
> (2) **Not later than December 15 of the second academic year of service**, if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.
>
> (3) At least twelve months before the expiration of an appointment after two or more years in the institution.

Other obligations, both of institutions and of individuals, are described in the **Statement on Recruitment and Resignation of Faculty Members**, as endorsed by the Association of American Colleges and the American Association of University Professors in 1961.

8. The freedom of probationary teachers is enhanced by the establishment of a regular procedure for the periodic evaluation and assessment of the teacher's academic performance during probationary status. Provision should be made for regularized procedures for the consideration of complaints by probationary teachers that their academic freedom has been violated. One suggested procedure to serve these purposes is contained in the **Recommended Institutional Regulations on Academic Freedom and Tenure**, prepared by the American Association of University Professors.

9. A further specification of the academic due process to which the teacher is entitled under this paragraph is contained in the **Statement on Procedural Standards in Faculty Dismissal Proceedings**, jointly approved by the American Association of University Professors and the Association of American Colleges in 1958. This interpretive document deals with the issue of suspension, about which the **1940 Statement** is silent.

The **1958 Statement** provides: "Suspension of the faculty member during the proceedings is justified only if immediate harm to the faculty member or others is threatened by the faculty member's continuance. Unless legal considerations forbid, any such suspension should be with pay." A suspension which is not followed by either reinstatement or the opportunity for a hearing is in effect a summary dismissal in violation of academic due process.

The concept of "moral turpitude" identifies the exceptional case in which the professor may be denied a year's teaching or pay in whole or in part. The statement

applied to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year's teaching or pay. The standard is not that the moral sensibilities or persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally.

ENDORSERS

Association of American Colleges. 1941

American Association of University Professors. 1941

American Library Association
(Adapted for librarians). 1946

Association of American Law Schools. 1946

American Political Science Association. 1947

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In The

Supreme Court of the United States

October Term, 1996

JAMES B. HEALY,

Petitioner,

v.

FAIRLEIGH DICKINSON UNIVERSITY, FRANCIS J. MERTZ, NANCY S. BARRETT, MORDECHAI ROZANSKI,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Fairleigh Dickinson University, Francis J. Mertz, Nancy S. Barrett, and Mordechai Rozanski, respectfully request that this Court deny the petition for writ of certiorari, seeking review of three state court decisions.

OPINIONS BELOW

The New Jersey Supreme Court declined to review this matter, denying petitioner's request for certification. The court's order is reported at 145 N.J. 372, 678 A.2d 712 (1996). The Appellate Division reviewed and affirmed the decision made by the trial court. That decision is reported at 287 N.J. Super. 407, 671 A.2d 182 (App. Div. 1996). The decision of the New Jersey Superior Court, Law Division is reproduced at pages 16-22 of the appendix in the petition.

JURISDICTION

The petition claims to invoke 28 U.S.C. § 1257 as the basis of this Court's jurisdiction to review the determinations of the state tribunals. Respondents contend that the petition fails to establish the jurisdictional predicates of Section 1257, and thus certiorari should be denied. The jurisdictional deficiencies of the petition are addressed in the Reasons the Petition Should Be Denied portion of this Brief.

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the facts inaccurately recites the holdings of the trial court and the Appellate Division. Contrary to petitioner's version of the facts, there is simply no federal question involved in these proceedings and the issues decided below were solely ones of state law. Accordingly, respondents set forth the following counterstatement of the facts considered in the state-court proceedings.

On appeal, the Appellate Division of the New Jersey Superior Court affirmed the trial court's dismissal of the underlying complaint filed by petitioner. In the complaint, petitioner contended that the respondent university could not terminate his employment as a senior administrator because he had acquired tenure *de facto*. Essentially, petitioner argued that he was exempt from the rigorous tenure prerequisites found in the University's Faculty Handbook, including a doctorate which he did not possess, simply because he had been a faculty member for fourteen continuous academic semesters. Petitioner based his position upon a narrow reading of a single clause, taken out of context and unrelated to the obtainment of tenure, found in the Faculty Handbook.

The trial court found that there was a factual issue as to how many semesters petitioner had been a member of the faculty and thus put this question to the jury. Assuming that the jury found that petitioner had served the requisite semesters as a faculty member, the trial court, however, reserved for itself the legal question of contract interpretation, namely whether petitioner had acquired tenure *de facto*. Although the jury found that petitioner

had served on the faculty for fourteen continuous semesters, the trial court held that petitioner did not acquire tenure *de facto* under New Jersey contract law. Accordingly, the trial court entered an order in favor of respondents dismissing the complaint with prejudice.

On appeal, the Appellate Division concluded that the trial court had properly reserved to itself the legal question of whether petitioner had acquired tenure *de facto*. The Appellate Division specifically found that the jury was not asked to determine whether petitioner had acquired tenure, but only the number of academic semesters he had been a faculty member as opposed to a member of the administration. Further, the Appellate Division held that the trial court had properly applied and interpreted New Jersey contract law in arriving at the conclusion that petitioner did not acquire tenure *de facto*. The Appellate Division did not reach in detail petitioner's fleeting argument that the respondent university violated his Fourteenth Amendment rights because it found that respondent was a private university. Significantly, petitioner never offered and the record is devoid of any evidence to dispute respondents' private non-governmental status. Accordingly, the Appellate Division correctly affirmed the dismissal of the complaint.

REASONS WHY THE WRIT SHOULD BE DENIED

Respondents oppose the petition because it fails to satisfy the jurisdictional predicates of 28 U.S.C. § 1257 (West 1993 & Supp. 1996) in six respects.

1. Only The Judgment Of The Highest State Court Which Has Reviewed The Matter May Be Reviewed By This Court.

The petition improvidently seeks the review of the determinations made by the New Jersey Superior Court, Law Division, the New Jersey Superior Court, Appellate Division, and the New Jersey Supreme Court. However, this Court only has jurisdiction over the determination made by the highest state court which has reviewed the matter. *See, e.g., Sullivan v. Texas,* 207 U.S. 416, 420 (1908); *Adam v. Saenger,* 303 U.S. 59, 61 (1938). As the New Jersey Supreme Court denied certification, the highest state court to review this case was the New Jersey Superior Court, Appellate Division. Thus, this Court may only exercise jurisdiction over the decision of the Appellate Division, and the writ should properly have been addressed to that court. Nonetheless, as established in paragraphs 2-6, *infra,* such jurisdiction is lacking, and thus the petition should be denied.

2. The State Court Proceedings Are Not Final.

Respondents oppose the petition because there are proceedings still pending before the New Jersey Supreme Court. Under Section 1257, this Court has jurisdiction to review only final decisions of state courts. *See* 28 U.S.C. § 1257; *O'Dell v. Espinoza,* 456 U.S. 430 (1982); *Market Street Railroad Co. v. Railroad Comm'n,* 324 U.S. 548, 551 (1945), *rehearing denied,* 324 U.S. 890 (1945). However, petitioner's motions for reconsideration and remand for a due process order made before the New Jersey Supreme Court have not yet been decided and thus this case is still

subject to further review and correction in a state tribunal. Consequently, the judgment by the state court is not the proper subject of a petition for certiorari. *See Market Street Railroad Co.*, 324 U.S. at 551. Therefore, the pending proceedings before the New Jersey Supreme Court preclude this Court from reviewing the decision below. *See id.*

3. The New Jersey Superior Court, Appellate Division Did Not Decide Any Issues Relative To The Individual Respondents.

Respondents oppose the petition as it applies to the three individuals, Francis J. Mertz, Nancy S. Barrett, and Mordechai Rozanski. Petitioner did not appeal the trial court's decision dismissing the complaint against the individual respondents, and thus the Appellate Division never addressed the issues as applied to them. It is well-established that this Court does not have jurisdiction over any issue not presented and decided in the state court. *See Howlett v. Rose*, 496 U.S. 356, 370 n. 16 (1990); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973). As a result, the petition is fatally defective as to the individual respondents, and thus should be denied.

4. The First Question Presented Fails To Raise A Federal Question.

Respondents oppose the petition because the First Question Presented is devoid of any specific federal issue sought to be reviewed by this Court. It is well-settled that mere reference or inference to a clause of the United

States Constitution is insufficient to confer jurisdiction upon this Court. *See Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935), *rehearing denied*, 296 U.S. 661 (1935); *Harding v. Illinois*, 196 U.S. 78, 88 (1904); *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914). Significantly, the First Question Presented does not make reference to any specific provision of the United States Constitution as required by Supreme Court precedent. *See New York Central & Hudson Railroad Co. v. City of New York*, 186 U.S. 269, 273 (1902); *Eiseman v. California*, 273 U.S. 663 (1927); *Swanson v. Sarja*, 263 U.S. 685 (1924). Nor does it comply with the dictates of Supreme Court Rule 14(1)(g)(i) as the petition fails to identify in what instance below the federal issue was raised or to provide "pertinent quotations of specific portions of the record" to establish that the federal question was timely or properly raised. SUP. CT. R. 14(1)(g)(i), 28 U.S.C. (West 1984 & Supp. 1996).

In fact, the issues raised in the First Question Presented were resolved by the New Jersey Superior Court, Appellate Division solely on independent state-law grounds. Applying New Jersey contract principles, the Appellate Division concluded that even if petitioner was considered a faculty member, he did not acquire tenure at the private university by virtue of his length of service. However, petitioner obstinately refuses to accept this sound interpretation of state law, instead asserting broad-based and nonspecific allegations of constitutional deprivations. Such sweeping contentions are patently insufficient to confer jurisdiction upon this Court.[1]

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[1] Should this Court hold that the First Question Presented raises a federal question, the petition should nonetheless be

5. The Second Question Presented Fails To Raise A Federal Question.

Respondents oppose the petition because the portion of the Second Question Presented asserting violations of the Fourteenth Amendment does not involve novel or contentious issues of federal law. Under Section 1257, this Court has jurisdiction to review only those state court decisions involving a substantial federal question. *See* 28 U.S.C. § 1257. In the Second Question Presented, the petition contends that the respondent university violated petitioner's due process rights by failing to bestow upon him tenure status. Yet, the petition does not recognize that the Fourteenth Amendment is inapplicable to private entities, such as respondent. *See National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Monroe v. Pape*, 365 U.S. 167, 172 (1961). Significantly, the record is devoid of any evidence that respondent University is a public institution or that petitioner ever contested its private-entity status. Even the petition itself repeatedly refers to the respondent as a "private university." (Petition, at i, ii, 11). As a result, this portion of the Second Question Presented is explicitly foreclosed by this Court's decisions in *Tarkanian*, *Shelley*, and *Monroe*, *supra*. Thus, the petition should be denied. *See Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952).

In addition, the petition asserts that the New Jersey Superior Court, Law Division, the New Jersey Superior

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denied for the reasons specified in paragraphs 5 and 6, *infra* pages 7-10.

Court, Appellate Division, and the New Jersey Supreme Court violated petitioner's due process rights by failing to review his Fourteenth Amendment issues. (Petition, at ii, 9-16). This argument is patently without merit. Both the Law Division and Appellate Division specifically found that respondent was a private university. Consequently, there was no reason for either court to conduct any further Fourteenth Amendment analysis because there was simply no state action. Such a determination is wholly consistent with this Court's precedent. *See, e.g., Tarkanian,* 488 U.S. at 191; *Shelley,* 334 U.S. at 13; *Monroe,* 365 U.S. at 172.

Moreover, contrary to petitioner's unsupported protestations, the New Jersey Supreme Court is not required to grant certification to review all decisions appealed from lower courts. *See* N.J. Ct. R. 2:12-4 (Gann 1996); *In re Route 280 Contract,* 89 N.J. 1, 1-2; 444 A.2d 51 (1982); *Terminal Construction Corp. v. Atlantic City Sewerage Authority,* 67 N.J. 403; 341 A.2d 327 (1975). Accordingly, review of this matter was discretionary and the New Jersey Supreme Court was entirely within its province to deny the petitioner's request for certification.

6. The Second Question Presented Raises An Issue That Was Not Raised In The Decision Or Record Below.

Respondent opposes the petition because the Second Question Presented contends that the state courts failed to uphold the petitioner's First Amendment protections. Specifically, the petition asserts that the state courts violated his First Amendment right to academic freedom by

not addressing his Fourteenth Amendment claims. (Petition at ii, 11-16). Contrary to the arguments in the petition, the state courts, as established in paragraph 5, *supra*, did in fact address plaintiff's Fourteenth Amendment claims. However, the state courts did not reach petitioner's federal due process claims in substance because they found respondent was a private university. Significantly, petitioner never offered any evidence into the record to dispute respondent's private status. Accordingly, the decisions by the state tribunals were wholly consistent with this Court's precedent. *See, e.g., Tarkanian,* 488 U.S. at 191; *Shelley,* 334 U.S. at 13; *Monroe,* 365 U.S. at 172.

Furthermore, the facts of the record demonstrate that petitioner never raised a First Amendment claim before the state courts. As noted above, the only federal issue put before the state tribunals was a fleeting claim of a Fourteenth Amendment violation. It is well-established that this Court does not have jurisdiction over any issue not presented and decided in the state court. *See Howlett,* 496 U.S. at 370 n. 16; *Cardinale,* 394 U.S. at 438; *Tacon,* 410 U.S. at 352. The record in this case, including petitioner's state-court complaint, is barren of any inference of an alleged First Amendment infringement. Significantly, the petition fails to identify in what instance below the First Amendment issue was raised for review, nor provides "pertinent quotations of specific portions of the record" to establish that the federal question was timely or properly raised as required by Supreme Court Rule 14(1)(g)(i). Sup. Ct. R. 14(1)(g)(i), 28 U.S.C. (West 1984 & Supp. 1996). As a result, the petition is fatally defective, and thus, in the context of this record, any resolution of this aspect by

the Second Question Presented would result in an impermissible advisory opinion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

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No. 96-456

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JAMES B. HEALY

Petitioner,

vs.

FAIRLEIGH DICKINSON UNIVERSITY, FRANCIS J. MERTZ, NANCY S. BARRETT, MORDECHAI ROZANSKI,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO THE COUNTERSTATEMENT OF THE CASE

Respondents' Counterstatement of the Case is disputed on several points. Petitioner's contention is that his faculty position cannot be terminated without adequate cause because of his acquisition of tenure and/or because Fairleigh Dickinson University failed to accord him the contracted procedures associated with the faculty position and any dismissal therefrom. Respondents' counterstatement skirts these points by mischaracterizing the dispute around the termination of the senior administrator position.

Further, counsel for the University again attempts to disparage petitioner through incorrect and extraneous assertions about petitioner's teaching qualifications, which unfortunately have made their way into the lower courts' decisions. Specifically, the Counterstatement of the Case in respondents' brief claims that petitioner does not have a prerequisite doctorate degree for tenure. Petitioner's teaching qualifications as a faculty member were not at issue for, or reviewed by, the University at the time preceding his dismissal. That review was limited only to a performance evaluation associated with the administrator position. The University refused to recognize petitioner's faculty status, thereby avoiding the contract procedures attendant thereto, including peer review of his faculty qualifications before any action relative to his retention or removal from the faculty. The jury has determined that petitioner was a faculty member at the time of his separation from the University; the courts failed in their decisions to accord petitioner the due process associated with that status.

The assertion of counsel for the respondents that a doctorate was a tenure prerequisite found in the University's Faculty Handbook is incorrect. The 1988 FDU Faculty Handbook's section on tenure (Section 5.1 - Renewal of

Probationary Faculty) sets forth the criteria as "Appropriate academic degrees and, where applicable, other certifications." It is possible to acquire tenure without a doctorate degree. The level of degree is really associated with faculty rank, not tenure; tenure is related to time of teaching service whereby protections are acquired relative to dismissals without adequate cause in order to protect academic freedom and the free exchange of ideas and the pursuit of knowledge so integral to the educational endeavor.

The 1988 FDU Faculty Handbook (relevant portions of which were placed into evidence at trial and are found in the Plaintiff-Appellant's Appendix to the N.J. Superior Court, Appellate Division) is consistent with the above in that Section 1.3 (Criteria for Faculty Ranks) sets forth the level of degree or equivalent for each rank. Hence, for the rank of Instructor, "the candidate must possess an earned master's degree (or equivalent) and demonstrate potential for effective teaching...." "A candidate for Assistant Professor "...must possess the earned doctoral or professional degree or equivalent normally required for teaching in his or her field...." For promotion or appointment to the rank of Associate Professor, the candidate must possess the qualifications for an Assistant Professor, and, in addition, professional growth and accomplishment beyond the earned doctorate or its equivalent demonstrated by scholarly publication or other externally recognized work appropriate to the discipline...." Petitioner was promoted to Associate Professor in 1980, recognized by the University as having the level of degree appropriate to his discipline (Hotel, Restaurant, and Tourism Management - there are very few doctorate programs in this specialized discipline) and in satisfying the requirement for externally recognized work through his thirty plus years of hospitality management experience in the industry and field and his research

endeavors in scholarly publications.

REPLY TO RESPONDENTS' POINTS

1. The final judgment or decree of the New Jersey Supreme Court may be reviewed by the Honorable Court.

The United States Supreme Court may review the final judgment or decree of the highest court of a state in which a decision could be had. 28 U.S.C. § 1257. In the instant matter, the New Jersey Supreme Court, the highest state court in which petitioner has sought, and could have sought review of this matter, including the constitutional questions, has rendered a decree filed on June 5, 1996 denying certification of the case for hearing. (See Petition for a Writ of Certiorari, App. 5). This decree and the lower court determinations are hence reviewable by the Honorable Court. In the instant case, petitioner argues that he has been denied procedural due process by the New Jersey courts.

Respondents' citations to Sullivan v. Texas, 207 U.S. 416, 420 (1908) and Adam v. Saenger, 303 U.S. 59, 61 (1938) are not applicable to the instant case. In both of those cases, the Texas Supreme Court denied hearing the matters "for want of jurisdiction." In the instant matter, the New Jersey Supreme Court did not deny certification because of lack of jurisdiction, thus the determination of the New Jersey Supreme Court is the decree of the highest State court in which a decision could be had. Review of this decree and of the judgments of the lower state courts in the matter is therefore sought.

2. The State court proceedings may be considered final for purposes of Rule 13.

The New Jersey Supreme Court determination denying certification was filed on June 5, 1996. Unfortunately, petitioner's counsel did not receive that decision until June 10, 1996. In light of this delay and since the period for filing subsequent motions is very short (ten days) in New Jersey, petitioner is concerned that the June 18, 1996 motions for reconsideration of the petition for certification and for a due process order (See Petition for a Writ of Certiorari, App. 1) may not be considered by the New Jersey Supreme Court as timely filed and received by it. Thus, for purposes of Rule 13.3, absent an extension of time from the New Jersey Supreme Court for the subsequent motions, the June 5, 1996 entry of its final decree became the operative date for filing the Petition for a Writ of Certiorari with the Honorable Court. Under Rule 14.5, the Clerk of the U.S. Supreme Court afforded additional time for filing of the Petition for a Writ of Certiorari, which was timely filed with this Honorable Court.

At this time, the New Jersey Supreme Court has not rendered a decision on the two motions before it. It is understood that the federal rule (Rule 13) governs, thus the Petition for a Writ of Certiorari was filed so that it would be timely under that Rule and would not be lost. (See Petition for a Writ of Certiorari, p.1).

3. Parties to the matter have been listed pursuant to Rule 12.

Petitioner acknowledges that the primary respondent in this matter is Fairleigh Dickinson University. Since the matter entails issues related to procedural due process by the

lower courts, the University and its officials, the individual respondents (Francis J. Mertz, Nancy S. Barrett, and Mordechai Rozanski) as agents of the University are listed as parties under Rule 12. The University and the three individuals were all listed as parties at the inception of the case in the complaint filed in the Superior Court of New Jersey, Law Division (Bergen County).

4. The first question presented does raise a federal question.

Petitioner has specifically raised federal constitutional due process questions in his Petition for a Writ of Certiorari, most particularly stated in the section thereof setting forth the "Reasons for Granting the Petition." The specific federal constitutional provisions and issues are therein set forth. The petition must be read as a whole. The case cited by respondents in New York Central & Hudson Railroad Co. v. City of New York, 186 U.S. 269 (1902) actually confirms that petitions should be looked at in their entirety.

Respondent acknowledges that federal constitutional issues were raised in the N.J. Superior Court, Appellate Division, by contending in the Respondent's Brief in Opposition, p.6, that, "In fact, the issues raised in the First Question Presented were resolved by the New Jersey Superior Court, Appellate Division solely on independent state-law grounds."

Petitioner in the Petition for a Writ of Certiorari, pp. 8-16, has given a concise statement of when the federal questions were raised, a summary thereof, and where the specific references are in the record below. For the Court's reference, the following is an excerpt from the plaintiff-appellant's brief to the N.J. Superior Court, Appellate

Division:

> The general definition of tenure connotes two concepts, time and possession. The U.S. Supreme Court in Board of Regents v. Roth, 408 U.S. 564 (1974), and Perry, supra., have provided a context for the ascription of a property interest in academic tenure. They have included an analysis thereof under the Fourteenth Amendment to the Constitution and the rights to due process. See expert testimony relating to tenure and its definition...

A key element in the decision of the New Jersey Superior Court, Appellate Division, is the application of the "dominant" or "principal" purpose rule in contract interpretation from the case of Newark Publisher's Assoc. v. Newark Typographical Union, 22 NJ 419 (1956). In applying this rule for the first time, which that court indicates "undoubtedly guided...the trial judge..." (See Petition for a Writ of Certiorari at App. 14-15), the tenure by procedure method of the contract between Healy and Fairleigh Dickinson University was found to be dominant and controlling, though the court failed to effect that same procedure for the benefit of petitioner and thereby denied him procedural due process under the 14th Amendment of the U.S. Constitution. Petitioner timely raised this point on appeal to the New Jersey Supreme Court.

Unlike many of the cases cited in Respondents' Brief in Opposition, where there is a federal question related to the constitutionality of a statute, the instant case raises federal constitutional issues relative to the procedural due process

accorded (or not accorded) petitioner by the state courts. The state courts failed to give complete and consistent effect to the jury and judicial determinations confirming Healy's faculty status, depriving him of the very procedures which the N.J. Superior Court, Appellate Division, states are applicable. (See Petition for a Writ of Certiorari, App. 1-4).

The U.S. Supreme Court has acted to protect federal due process rights of individuals with respect to actions of the state courts in such cases as Shelley v. Kraemer, 334 U.S. 1 (1948) and Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930). These cases, unlike many of those cited in Respondents' Brief in Opposition, directly relate to the two questions presented by petitioner, since they relate to the procedural due process accorded (or not accorded) in the state courts that is protected by the due process clause of the Fourteenth Amendment.

5. The second question presented raises a federal question.

Petitioner first presented the applicability of the 1940 Statement of Principles on Academic Freedom and Tenure to his case at trial through the testimony of his expert witness, Dr. Donald Koster. The N.J. Superior Court, Appellate Division, ruled that "...once the trial court correctly determined that the interpretation of the contract language was a legal matter, she was obligated to disregard the expert's opinion concerning it interpretation." Healy v. Fairleigh Dickinson University, 287 N.J. Super 407, 413 (1996), 671 A.2d 182, 185 (1996). Such a sweeping so-called obligation to disregard the expert's testimony regarding the distinct and unique practices and procedures in academe indicates the morass in which petitioner's procedural due process has been neglected and harmed by the

state courts.

Both the trial court and the Appellate Division totally ignored in their decisions the applicability of the 1940 Statement of Principles on Academic Freedom and Tenure, which the University specifically subscribed to in its contract documents with petitioner. The case of Shelley, infra. involved improper state court action, violative of the Fourteenth Amendment, in the enforcement of contractual provisions between private parties. The instant case involves a converse issue, that is the failure of state courts, in violation of the Fourteenth Amendment due process clause, to enforce expressed procedural provisions of a contract between private parties impacting an individual's freedom of expression and property rights.

The University has voluntarily and knowingly ascribed to the 1940 Statement of Principles on Academic Freedom and Tenure. Petitioner must rely on the courts for the enforcement of the University's express agreement as to these nationwide procedures which are designed specifically to protect freedom of speech (academic freedom). Nothing precludes a private institution, including those such as the respondent which receive state funding, from adhering to the concept of academic freedom, freedom of speech, and academic tenure, and agreeing in their contracts with faculty to assure the same. The courts are not precluded by federal constitutional law from enforcing such contract provisions because the institution is considered private. In this regard, the last clause of the Second Question Presented is quite pertinent, "...which the state courts are called upon to uphold....." Petitioner must rely on the courts to uphold procedural due process as expressly agreed in the contract documents.

6. The second question presented raises an issue that has been raised in the record below.

The very first point in petitioner's brief to the New Jersey Supreme Court (page 7) opens with a key reference to academic freedom and the First Amendment from Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967), which has also been set forth in the Petition for a Writ of Certiorari at page 15. Further, various arguments relative to due process associated with academic freedom (which under Keyishian is of special concern of the First Amendment) were therein presented. For example, from pages 17-18 of that brief are the following excerpts:

> The U.S. Supreme Court in Board of Regents v. Roth, 408 U.S. 564 (1974) and Perry v. Sinderman, 92 S.Ct. 2717 (1972) have provided a context for the ascription of property interest in academic tenure, and the rights to due process under the Fourteenth Amendment to the U.S. Constitution. Since academic tenure is itself a procedural protection existing in academe to protect academic freedom and a faculty member's livelihood so that he or she can exercise academic freedom, the property and liberty interests protected by law include the livelihood or positions of the faculty member and also include the freedom of speech so necessary in the university setting. The 1940 Statement to which the University has subscribed clearly sets forth that academic tenure relates to academic freedom, and that academic freedom is to be afforded not only to tenured faculty, but also

to non-tenured faculty, (Pa 118). "Academic Freedom is of special concern of the First Amendment," Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (Brennan, J.), see also Meyer v. State of Nebraska, 262 U.S. 390 (1923). The Supreme Court is thus requested to find as a matter of law this relationship of academic tenure to academic freedom and discern how it thereby affects constitutional rights as in this case where Healy exercised his academic freedom to speak on a matter of public concern in protecting the interests of students and alumni.

CONCLUSION

Petitioner seeks basic procedural due process, as protected by the U.S. Constitution, in a matter in which the lower courts have effectively deprived him of his property interests in his livelihood and contractual rights as well as his liberty rights associated with academic freedom and freedom of speech, without completely giving effect to the jury and judicial findings of his faculty status and the attendant rights and procedures clearly associated therewith as set forth in his contract with the University and in the 1940 Statement of Principles on Academic Freedom and Tenure which is part of that contract.

Respectfully submitted,

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